

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SUPER 8 WORLDWIDE, INC., *formerly known*)
as Super 8 Motels, Inc.)

Plaintiff,)

vs.)

MARIO CARUSO, ANNELIESE CARUSO,)
MARIO AND ANNELIESE CARUSO)
REVOCABLE FAMILY TRUST, *also known as*)
MARIO AND ANNELIESE CARUSO)
REVOCABLE FAMILY TRUST,)

Defendants.)

Case No.: 2:10-cv-00552-GMN-PAL

ORDER

Pending before the Court is Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (ECF No. 14); Plaintiff's Response (ECF No. 15); and Defendants' Reply (ECF No. 16). Defendants argue that: (1) this lawsuit is barred by the statute of limitations; (2) the issues referenced in the Complaint were previously adjudicated by the United States District Court for the District of South Dakota; and (3) that venue is improper because the franchise agreement upon which Plaintiff's claims are based contains a forum selection clause designating South Dakota as the proper forum in which to bring a lawsuit arising from the agreement. Because the Court finds that venue is improper in the District of Nevada, it will dismiss this lawsuit without prejudice and without reaching Defendants' remaining arguments.

I. FORUM SELECTION CLAUSE

This lawsuit arises out of Defendants' alleged breach of their franchise agreement with Plaintiff. Plaintiff attached a copy of that agreement to its Complaint. Relevant to this Order, page 18 of the franchise agreement provides:

1 The parties hereby agree that a portion of the franchise activities will
2 take place in Aberdeen, Brown County, South Dakota, so that the
3 parties hereby agree and FRANCHISEE hereby consents that all
4 litigation by or between the parties arising directly or indirectly from
5 the franchise relationship shall be commenced and maintained either
6 in the Fifth Judicial Circuit Courts of the State of South Dakota in
7 Brown County or the United States District Court, Northern
8 Division. FRANCHISEE specifically consents to the jurisdiction of
9 such courts over any disputes arising out of the Franchise relations
10 between the parties hereto.

11 (Ex. A, Compl., ECF No. 1.) The agreement also contains a choice of law provision, which
12 states: "It is stipulated that this Agreement has been negotiated in part within the State of South
13 Dakota and shall be construed according to the laws of that State and the United States. The
14 language in all parts of this Franchise Agreement shall in all cases be construed as a whole
15 according to its fair meaning and neither strictly for nor against either FRANCHISOR or
16 FRANCHISEE." (Ex. A, Compl., ECF No. 1.)

17 **II. ANALYSIS**

18 A motion to dismiss based on a plaintiff's alleged failure to comply with a forum
19 selection clause is properly treated as a Rule 12(b)(3) motion to dismiss for improper venue.
20 *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). Under both federal and South Dakota
21 law, forum selection clauses are enforceable unless the party opposing the clause carries the
22 heavy burden of demonstrating that the clause at issue is "unreasonable." *See, e.g., Murphy v.*
23 *Schneider National, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004); *Green v. Clinic Masters, Inc.*,
24 272 N.W.2d 813, 815 (S.D. 1978). There are three factors that can render a forum selection
25 clause unreasonable: "(1) if the inclusion of the clause in the agreement was the product of fraud
or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of
his day in court were the clause enforced; and (3) if enforcement would contravene a strong
public policy of the forum in which suit is brought." *Murphy*, 362 F.3d at 1140 (internal

1 quotation marks omitted).

2 Plaintiff does not dispute that the franchise agreement contains a valid forum selection
 3 clause that designates South Dakota as the appropriate forum for disputes arising out of the
 4 agreement, nor does Plaintiff contend that the clause is unreasonable or otherwise
 5 unenforceable. Instead, Plaintiff simply contends that it filed suit in Nevada because: (1) the
 6 “venue clause is purely historical” in that Plaintiff has since moved its headquarters from South
 7 Dakota, and (2) it thought that Nevada would be a more convenient forum for Defendants.
 8 (Resp. 8:4-20, ECF No. 15.) Neither of these arguments is sufficient to render the clause
 9 unreasonable, nor does Plaintiff actually contend that either is. Instead, these rationales seemed
 10 aimed at countering Defendants’ contention that Defendants are entitled to attorney’s fees
 11 because Plaintiff’s initiation of this lawsuit in Nevada needlessly multiplied the necessary legal
 12 proceedings and violated “the sound principles of judicial economy,” (Reply 6:17-21, ECF No.
 13 16). However, in light of Plaintiff’s seemingly genuine attempt to file this lawsuit in a forum
 14 that was more convenient to Defendants--notably, Defendants reside in Nevada--and Plaintiff’s
 15 agreement with Defendants that it would not oppose a motion to transfer venue, (*see* Resp. 8:15-
 16 20, ECF No. 15), this Court does not find attorney’s fees to be appropriate. The forum selection
 17 clause is, however, enforceable, so this lawsuit will be dismissed without prejudice to Plaintiff
 18 being able to re-file it in South Dakota.¹

19 CONCLUSION

20 **IT IS HEREBY ORDERED** that Defendants Motion to Dismiss for improper venue
 21 (ECF No. 14) is **GRANTED**. This lawsuit is **DISMISSED without prejudice** to it being re-

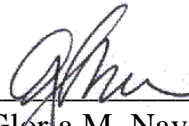
22 ///

23 ///

24
 25 ¹ Although some courts have noted that “[t]ransfer is more in the interest of justice than dismissal” when venue is found to be improper under Rule 12(b)(3), *see, e.g., Davis Media Group, Inc. v. Best Western International, Inc.*, 302 F. Supp. 2d 464, 470 (D. Md. 2004), dismissal in this instance affords Plaintiff the choice of re-filing the lawsuit in either a South Dakota state or federal court.

1 filed in South Dakota. However, attorney's fees are not awarded.

2 DATED this 21st day of July, 2011.

3
4 
5 _____
6 Gloria M. Navarro
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25